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IN THE

Supreme Court of the United States

October Term, 1976

No. .....

76-888

AVCO COMMUNITY DEVELOPERS, INC.,

Appellant,

vs.

SOUTH COAST REGIONAL COMMISSION, an agency of the State of California, and CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION, an agency of the State of California,

Appellees.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

FULOP, ROLSTON, BURNS & MCKITTRICK,
A Law Corporation,
IRWIN M. FULOP,
LAWRENCE R. RESNICK,
9665 Wilshire Boulevard, 7th Floor,
Beverly Hills, Calif. 90212,
(213) 278-6500,

Attorneys for Appellant
Avco Community Developers, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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JURISDICTIONAL STATEMENT.

I
OPINION BELOW.

The opinion of the Supreme Court of the State of California, as modified, is reported at 17 Cal.3d 785, 18 Cal.3d 177b, 132 Cal.Rptr. 377, 553 P.2d 537 (1976), and is set forth in Appendix A, *infra*.

II
JURISDICTION.

A. Procedural History.

Appellant, AVCO COMMUNITY DEVELOPERS, INC. ("Avco") commenced the present action by the filing of a complaint seeking a writ of mandate declaring

that Avco had a vested right to develop its real property, known as Tract 7479, in accordance with the uses for which Orange County, California, had given final discretionary approval, free from the permit requirements of the California Coastal Zone Conservation Act of 1972, California *Public Resources Code* §§27000, *et seq.* (the "Act").[1] Avco claimed that development of Tract 7479 in accordance with these finally approved uses was exempt from this subsequent governmental regulation under the common law of vested rights and a constitutionally acceptable construction of the statutory exemption provided in §27404 of the Act. Although the trial court recognized that fairness required that Avco be permitted to develop Tract 7479 free from the permit requirements of the Act, it denied Avco the requested writ of mandate in a judgment entered on August 5, 1974. A copy of the trial court's judgment is attached hereto as Appendix B. The sole premise of the trial court's decision was that the words "building permit", as used in §27404, required a literal construction, *i.e.*, a permit to construct a specific building, in order to establish the existence of a vested right.

Avco filed a notice of appeal with the California Court of Appeal on August 12, 1974. A copy of the notice of appeal is attached hereto as Appendix C.

After submission of all briefs and the hearing of oral argument, the Court of Appeal of the State of California, Second Appellate District, Division Two, filed its opinion on July 9, 1975, which reversed the judgment of the trial court, and confirmed Avco's

[1]All code references are to the California *Public Resources Code*, unless expressly noted otherwise.

vested right to develop and use Tract 7479. Appellees, SOUTH COAST REGIONAL COMMISSION and CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION (the "Commissions"), thereupon petitioned the California Supreme Court for a hearing, which was granted on September 4, 1975. On August 25, 1976, the California Supreme Court filed the opinion (as modified by an order of the Court filed on September 29, 1976) which appears in Appendix A affirming the trial court's denial of the writ of mandate because of its agreement with the trial court's construction of §27404.

Avco filed a petition for rehearing before the California Supreme Court on September 10, 1976, which petition was denied on September 29, 1976. A copy of the notice of denial is attached hereto as Appendix D. Avco's notice of appeal to this Court was filed with the clerk of the California Supreme Court on November 24, 1976. A copy of the notice of appeal is attached hereto as Appendix E.

B. Jurisdictional Ground.

The case at bar involves the construction of §27404, which states:

> "If, prior to November 8, 1972, any city or county has issued a building permit, no person who has obtained a vested right thereunder shall be required to secure a permit from the regional commission; provided that no substantial changes may be made in any such development, except in accordance with the provisions of this division. Any such person shall be deemed to have such vested rights if, prior to November 8, 1972, he has in good faith and in reliance upon the build-

ing permit diligently commenced construction and performed substantial work on the development and incurred substantial liabilities for work and materials necessary therefor. Expenses incurred in obtaining the enactment of an ordinance in relation to the particular development or the issuance of a permit shall not be deemed liabilities for work or material."

Avco contends that, as construed by the California Supreme Court, §27404 violates the provisions of the Fourteenth Amendment to the United States Constitution. This Court therefore has jurisdiction pursuant to 28 U.S.C. §1257(2). A claim that a state statute has been construed so as to violate a provision of the United States Constitution, if denied by the highest state court in which review could be had, invokes the appellate jurisdiction of this Court. *Cohen v. California*, 403 U.S. 15, 17-18 (1971); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

In the event that this Court does not consider appeal to be the proper mode of review, Avco hereby requests that this Jurisdictional Statement be regarded and acted upon as a petition for writ of certiorari pursuant to the provisions of 28 U.S.C. §2103.

III
QUESTIONS PRESENTED.

(1) Is it arbitrary, unreasonable, and capricious, and therefore a denial of due process of law under the Fourteenth Amendment, to interpret the building permit language of the vested rights section of subsequently enacted legislation (§27404) as requiring a test which looks to the

issuance of a permit to construct a specific building as the *sine qua non* of a claimed vested right to specific uses of real property which had received prior final discretionary governmental approval?

(2) Is it a denial of equal protection under the Fourteenth Amendment to recognize a vested rights claim of a county agency while refusing to recognize Avco's vested rights claim where the real property owned by the county agency is contiguous to Avco's real property, both parcels were being developed simultaneously by Avco, and neither the county agency nor Avco had been issued a building permit?

IV
STATEMENT OF THE CASE.

In 1972, by initiative, the people of the State of California adopted the California Coastal Zone Conservation Act of 1972. Section 27400 requires that any person (and §27105 defines "person" to include local governmental agencies) wishing to perform development within a specified area adjoining the Pacific Ocean obtain a coastal zone permit. Section 27404 provides a vested rights exemption to the permit requirements of the Act.

Prior to November 8, 1972, Avco had received final discretionary approval of the use of each lot in Tract 7479 in addition to a number of other approvals and permits from Orange County including, but not limited to, the following:

(1) Amendment No. 4 to the general plan covering all of Avco's property including Tract 7479;

(2) A development plan for all of Avco's property including Tract 7479;

(3) Planned community zoning for all of Avco's property including Tract 7479;

(4) Planned community district regulations for all of Avco's property including Tract 7479;

(5) Tentative and final tract maps for Tract 7479; and

(6) Improvement plans for Tract 7479. (Finding of Fact No. 46, R. 360-361.)

In reasonable reliance upon these, and other, permits and approvals, Avco had begun to develop and construct subdivision improvements on Tract 7479. The trial court found that these subdivision improvements constructed by Avco were reasonably intended to accommodate buildings and could not reasonably be used for any other purpose. (Finding of Fact No. 51, R. 385.) Prior to November 8, 1972, Avco had expended over $1,600,000 and incurred liabilities in excess of $1,100,000 in developing Tract 7479. (Finding of Fact No. 37, R. 360.) Avco had not obtained a permit to construct any specific building on Tract 7479 before November 8, 1972. (Finding of Fact No. 30, R. 357.) Under the procedure mandated by Orange County's ordinances, a building permit cannot be issued until after grading has been completed and Avco had not completed the grading of Tract 7479 as of November 8, 1972.

By an agreement known among the parties as the "Beach Agreement", Avco sold approximately 34 acres of Tract 7479 to the Orange County Harbor District. Eleven acres were sold at substantially less than the fair market value with the sale being conditioned upon

the performance of various actions by Orange County and the State of California. (Finding of Fact No. 24, R. 376-377.) Part of the Beach Agreement required Avco to develop the 34 acres, including the construction of several buildings, for the Orange County Harbor District. In order to do this Avco applied for an exemption from the permit requirements of the Act on behalf of the Harbor District at the same time it applied for an exemption to complete the development of the balance of Tract 7479. Development of the 34 acres was planned to be performed simultaneously with the remainder of Tract 7479 (and, in fact, development was commenced simultaneously) as the two parcels of land were intended to be served by common utilities. While the Commissions recognized the vested rights claim which Avco had asserted on behalf of the Harbor District, the Commissions refused to recognize Avco's own vested rights claim.

The trial court concluded that Avco did not have vested rights *solely* because Avco did not have a "building permit", notwithstanding its conclusion that fairness required that Avco be allowed to complete development of Tract 7479. (Conclusions of Law No. 5 and 9, R. 388, 389.)

Avco first raised federal constitutional questions in its petition for writ of mandate (R. 5-6) and raised them once again in its supplement to petition for writ of mandate. (R. 127-128.) The trial court upheld the validity of the Act, stating:

> "The Act is not unconstitutional as applied to Petitioner and is not invalid nor does it violate the Fifth or Fourteenth Amendments to the Constitution of the United States . . ." (Conclusion of Law No. 11, R. 389-390.)

Avco again argued the constitutional questions in its opening brief to the California Court of Appeal and in its reply brief. That court, because it found in Avco's favor, did not reach the constitutional questions. There were no constitutional questions raised in Avco's answer to the Commission's petition for hearing before the California Supreme Court for the same reason. However, the due process question was specifically brought to the Court's attention in a letter immediately after oral argument. The California Supreme Court held that the Act was constitutional on its face and as applied. (17 Cal.3d at 800-801.) Avco raised the constitutional question yet again in its petition for rehearing. The California Supreme Court denied the requested rehearing without opinion.

The questions presently before this Court were thus timely raised before the courts of the State of California and are presently within this Court's appellate jurisdiction.

V

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

The federal questions presented to this Court are substantial in three senses of the word. First, whether due process requires that a developer have a permit allowing construction of a specific building as a condition precedent to the acquisition of vested rights to specifically approved uses and densities of use of lots in the subdivision development context will determine the outcome of the case at bar. Second, federal law is unsettled as to the conditions precedent to the acquisition of a vested right because this Court has not addressed the question for over 70 years since its

decision in *Dobbins v. City of Los Angeles,* 195 U.S 223 (1904). Third, the question presented for this Court's review goes directly to the definition of property, the relationship between property rights and governmental regulation, the protection contained in the Fourteenth Amendment to the United States Constitution, and the application of the equal protection portion of the Fourteenth Amendment when it is a governmental agency, rather than another private person, who is given an unfair advantage.

A. The Law Is Unsettled as to Whether a Vested Right to Complete Development of a Multi-Acre, Multi-Structure Residential Subdivision Can Be Established Where a Developer Has Substantially Relied in Good Faith on Governmental Approvals of Specific Uses and Densities but Where a Permit to Construct a Specific Building Has Not Been Issued.

As noted above, one of the questions presented for this Court's review is the interaction between due process and the conditions precedent to the acquisition of a vested right. When limited to the situation of a single building on a single lot, Avco has no quarrel with the definition provided by the California Supreme Court:

> "It has long been the rule in this State and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws,

prohibit construction authorized by the permit upon which he relied." 17 Cal.3d at 791 [citations omitted].

As pointed out by the California Supreme Court, it has been generally held that where a developer claims a vested right to construct a *single identifiable building* the required governmental approval is a "building permit", that is, a document identifying the specific building to be constructed. (17 Cal.3d at 792-793.) What is not clear, and what is being presented for this Court's review, is whether the required "permit" in the subdivision context is the same piece of paper. The California Supreme Court's opinion makes it clear that it is. The Court's opinion stresses the lack of specificity as to the buildings to be constructed (17 Cal.3d at 794) while completely overlooking the fact that Avco's contention is not that it has a right to construct specific buildings but rather that it has a vested right to complete the development of Tract 7479 consistent with the uses (multi-family residential buildings) and up to the densities specifically approved by Orange County subject to the obvious *caveat* that Avco comply with the terms and provisions of the Orange County building code in order to have permits allowing the construction of specific buildings issued. It is this oversight by the California Supreme Court that is at the heart of Avco's claim that a test of vested rights as to *use* in the subdivision context is arbitrary, unreasonable, and capricious.

Other state courts have recognized that constructing a subdivision is quite different from erecting a single building. A number of cases have found that developers constructing a subdivision had gained vested rights

to complete the entire development after expending funds and incurring substantial liabilities in good faith reliance upon approved tentative tract maps or similar approvals.

Thus, in *Ward v. City of New Rochelle*, 20 Misc.2d 122, 197 N.Y.S.2d 64 (Sup. Ct.), *aff'd* (unanimously), 9 App.Div.2d 911, 197 N.Y.S.2d 128, *aff'd* (unanimously), 8 N.Y.2d 895, 204 N.Y.S.2d 144, 168 N.E.2d 821 (1960), the plaintiff was held to have a vested right to complete her development as planned, notwithstanding a change in applicable zoning. The zoning ordinance was amended, doubling the minimum lot size, almost immediately after the plaintiff's subdivision map was approved by the city. While the plaintiff had not commenced any construction on the site, she had, as a condition to subdivision map approval, dedicated and deeded a portion of the land, worth $140,000, to the city as a school site, just as Avco in the case at bar deeded land to the Orange County Harbor District, pursuant to the Beach Agreement, at a price below the fair market value. The New York courts unanimously found vested rights had accrued to the subdivider to complete her development:

> "Most cases of vested rights grow out of circumstances in which a permit has been issued by some municipal official with authority, and pursuant to that permit the permittee proceeds with his improvements, spends money to further it, and obligates himself with reference to it. It should be pointed out that if, in such cases, a vested right comes into being, although such expenditures are expected to be recouped by the sale of lots, how much more readily should a vested right come into being in a case such as this, where

> the [owner] has actually permanently parted with land of great value for the benefit of the School District and the City, as well, with no chance of recoupment, as in the case of the usual permittee, who claims a vested right." 197 N.Y.S.2d at 70-71.

In still another New York case, *Elsinore Property Owners Association, Inc. v. Morwand Homes,* 286 App. Div. 1105, 146 N.Y.S.2d 78 (1955), a group of property owners sought an injunction against a builder's completion of a subdivision, alleging that the builder was not complying with an amended zoning ordinance which had increased minimum lot size, width, and sideyard requirements. The builder defended by claiming a vested right to complete the subdivision as planned, *i.e.,* to be allowed to use it for the previously approved uses. The undisputed facts showed that defendant's predecessor in interest had received subdivision map approval for the entire tract (based upon the smaller lots) and had constructed (at a cost of $40,000) all of the required public improvements and some of the homes prior to the change in zoning requirements. The New York Supreme Court, Appellate Division, unanimously affirmed the trial court in granting judgment in favor of the builder, stating:

> "In our opinion, the original developers [and hence its successor] which furnished a performance bond and expended a substantial sum on required improvements, and which was not in default when the amendment was enacted, had a vested right to complete the development as planned, notwithstanding the area amendment of the zoning ordinance." 146 N.Y.S.2d at 81.

Also pertinent is *Appeal of Diamond,* 413 Pa. 379, 196 A.2d 363 (1964). There, the defendant planned a large, comprehensive development consisting of high-rise apartments, office buildings, and a shopping center. The township board rezoned the property to enable construction of the planned development. The defendant then obtained a permit for the first (of five) high-rise apartment buildings and commenced construction incurring substantial liabilities. Subsequently, the defendant sought a building permit for the shopping center, and the plaintiff, a "civil association", objected to the permit and sought an injunction against completion of the development because of alleged illegality in the rezoning. The Pennsylvania Supreme Court held that the plaintiff had waived its right to object to the rezoning by failing to object to the issuance of the permit for the first high-rise.[2] The Court stated that an

> ". . . integrated, comprehensive, stated development of a large tract may and should be treated as a single undertaking. . . . To allow a complex, comprehensive plan . . . to be attacked on a piece by piece basis would result in the greatest inequities to the developers." 196 A.2d at 370.

Many other jurisdictions have reached the same result. For example, in *River Forest State Bank v. Village of Hillside,* 6 Ill.2d 451, 129 N.E.2d 171 (1955), a developer was held to have acquired a vested right to complete a 42 lot subdivision using septic tanks, despite a subsequently adopted ordinance requiring sewer systems, because the subdivider, in reliance on the

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[2]In Pennsylvania, objections to zoning violations may only be raised by appeal from the grant or denial of the building permit. (196 A.2d at 367.)

Village's subdivision map approval, had incurred $20,000 in expenditures for water mains "to prepare the premises for the building of homes" prior to the adoption of the sewer ordinance. (129 N.E.2d at 173.)

See also, *DeKalb County v. Chapel Hill, Inc.*, 232 Ga. 238, 205 S.E.2d 864 (1974), where the Georgia Supreme Court held that a developer had a vested right to complete its development of apartments and townhouses and ordered that the development permit[3] be issued. The opinion stressed the substantial good faith reliance of the developer and the results flowing therefrom.

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[3]Apparently another name for a "building permit" because the opinion speaks of

> "... processing Chapel Hill's application for a development permit for its proposed construction of apartments and townhouses, and to issue such development permit, provided Chapel Hill's application shall comply in full with designated requirements of the DeKalb County Zoning Ordinance." 205 S.E.2d at 866.

"In reliance on the approval of its Community Unit Development Plan it has expended over $50,000 in developing a lake and recreational area. It has installed 2,000 linear feet of a sewer line for the anticipated apartments and townhouses. It has lost approximately $30,000 as the result of having to rescind a contract for the sale of the property on which the apartments and the townhouses were to be constructed. The diminution in value of the 125 acres planned for apartments and townhouses which can now be used only for single family dwellings, is approximately $1,500,000.00.

"Chapel Hill contends that it has acquired a vested property right, protected by the State and Federal Constitutions, by reason of its actions and expenditures made in reliance upon the approval of its plan.

* * *

"After Chapel Hill had expended substantial sums in developing its property, and dedicated park and school property to the county, all in reliance on this approval [of the Community Unit Development Plans], vested rights were acquired by it which can not be destroyed by the enactment of a later ordinance which required that rezoning be obtained for community unit development plans, and thereafter denying the necessary rezoning." 205 S.E.2d at 867, 868.

Again, in *Gruber v. Mayor and Tp. Com. of Raritan Tp.*, 39 N.J. 1, 186 A.2d 489 (1962), the New Jersey Supreme Court, citing *Elsinore Property Owners Association, supra,* with approval, found that a subdivider who had constructed four model homes, graded roads, built sidewalks and curbs and installed power poles (a total of $508,000 in expenditures and commitments)—all in reliance on the township's subdivision map approval—had a vested right to complete the residential development despite the passage of a new zoning ordinance (none had previously existed) limiting the use of the property to industrial uses.

The foregoing authorities have recognized that much time, effort, and money is expended by a builder in reliance on governmental approvals prior to the issuance of a permit to construct a specific building. They recognize that subdivisions are built in increments of a limited number of buildings. Subdividers develop their property in increments to ". . . facilitate orderly financing, development and selling . . ." *Telimar Homes, Inc. v. Miller,* 14 App.Div.2d 586, 218 N.Y.S.2d 175, 176 (1961). They have also recognized that the rights inhering in the developer of a subdivision are radically different from those inhering in one who would build a single building. The developer seeks to have a specific *use* recognized. That use is realized through the construction of various buildings over a period of time as buyers make their wants known. The reality of subdivision development requires incremental construction whose pace is controlled, in part, by lenders' reasonable concern for the adequacy of the security provided, *i.e.*, a saleable residential subdivision. The builder of a single building seeks the government's permission to erect a specific structure at a specific

time. The "building permit" is the final approval for the developer and the initial one for the builder of a single building.

To hold that a subdivider can achieve no vested rights, absent a "building permit", would mean that every subdivider would be hostage to any change, otherwise valid, promulgated by an appropriate governmental body. Such a holding, having ramifications far beyond the present controversy between Avco and the Commissions, would wreak havoc with the building industry, not only in California, but throughout the nation. As the Supreme Court of Utah said in *Wood v. North Salt Lake*, 15 Utah 2d 245, 390 P.2d 858, 860 (1964), where it held that a developer had vested rights to develop a subdivision as originally platted, notwithstanding the fact that an ordinance had subsequently been adopted increasing the minimum lot size:

> "This ordinance, if sanctioned, easily could dry up the mortgage market for investors in platted subdivisions, could alienate title companies from insuring any lots therein, discourage purchase of lots, and long-range subdivision development, impale title lawyers on the horns of a dilemma, and lead to a policy of accepting plats, only to sanction their arbitrary rejection, if one chooses not to build on vacant property within the year. All of which this court cannot deify."

The foregoing authorities make it clear that the position of the California Supreme Court is not universally accepted. The highest courts of other states

have found that fairness (and what is due process but the legal embodiment of fairness? See, *Galvan v. Press*, 347 U.S. 522, 530 (1954)) requires that the test of vested rights be suited to the factual situation of individual cases.

These cases are cited for two propositions. First, that the California Supreme Court is wrong in its view that a building permit is always required to acquire vested rights and that its view is a violation of the guaranty of due process. Second, that there is a definite split of authority among state courts on an important question of constitutional law which has a tremendous fiscal and social impact. This Court last decided a vested rights question in 1904 when it decided *Dobbins, supra*, and held that substantial reliance on a prior governmental approval established a vested right good against rezoning. But *Dobbins* did not speak to the question of fairness and due process in the context of modern land development practice in a time of spiraling costs for one of the most basic of human needs—housing.

> "The importance of the question, in which many States having similar laws are concerned, . . ., and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration." *West Coast Hotel v. Parrish*, 300 U.S. 379, 390 (1937).

B. Due Process Requires That a Developer of a Subdivision Have a Claim of Vested Rights Evaluated in a Fair and Reasonable Manner Rather Than by the Use of a Procrustean Rule Suited Only to the Construction of a Single Specific Building on an Isolated Lot of Ground.

Strictly speaking, the doctrine of vested rights is purely constitutional in nature, but, in practice, it is applied in terms of fairness and an equitable estoppel against the governmental unity involved. Heeter, *Zoning Estoppel: Application of the Principle of Equitable Estoppel and Vested Rights to Zoning Disputes,* Urban Law Annual 63 (1971). In the case at bar the trial court concluded:

> "Basic fairness to Petitioner requires that Petitioner be permitted to complete development of Tract 7479 including the construction of improvements and buildings thereon per said Planned Community District Regulations, said tentative and final tract maps and said model, but Petitioner is barred from doing so under the law of the State of California as enunciated in *Spindler Realty Corp. v. Monning,* 243 C.A.2d 255 solely by reason of its lack of a permit authorizing it to construct buildings." (Conclusion of Law No. 9, R. 366.)

In determining the rule to be applied when a developer, such as Avco, claims a vested right, a court of equity must look to the facts and circumstances of each case and not be constrained by prior rules which may be only partially applicable. The Supreme Court of Georgia recognized this when it said, in *Kiker v. City of Riverside,* 223 Ga. 142, 143, 154 S.E.2d 17 (1967):

> "Estoppel arises under a variety of circumstances and generally the cases rather than any rule must be reviewed and applied."

The rule which looks to the existence of building permits is a very mechanical test. Such a rule may make sense in the context of the construction of a single building but it is inappropriate and arbitrary in the case of a subdivision, which, as in this case, contemplates specific uses and the expenditure of substantial sums before the first building permit can be applied for or issued or the first building's foundation poured. It is beyond question that the use of a mechanical test, such as the existence *vel non* of a building permit, allows the drawing of a bright line by which all may be guided in their actions. It is also beyond dispute that such a line will often lead to injustice and unfairness in individual cases as in the case at bar. The application of such a one dimensional Procrustean test in the context of the development of a subdivision is almost guaranteed to lead to such unfairness and injustice.

This Court has made it very clear that the dictates of due process prohibit such an arbitrary test.

> "We have often repeated that '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" *Wolff v. McDonnell,* 418 U.S. 539, 560 (1974) [citation omitted].

By effectively requiring a "building permit" before a developer can acquire a vested right to specifically approved uses, the California Supreme Court has effectively created an irrebuttable presumption that no vested right can ever be obtained absent such a piece of

paper. This Court has frequently stated its views on irrebuttable presumptions.

> "Statutes creating permanent irrebutable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis v. Kline,* 412 U.S. 441, 446 (1973).

The definitive statement of this Court's views may be found in *Stanley v. Illinois,* 405 U.S. 645, 656-657 (1972), where an irrebuttable presumption, that an unwed father was an unfit parent, was struck down.

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." [Footnotes omitted.]

See also, *U.S. Department of Agriculture v. Murry,* 413 U.S. 508 (1973).

Further, this Court has frequently stressed that what satisfies the dictates of due process in one situation may not in another.

> "The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.' Due process of law guarantees 'no particular form of procedure; it protects substantial rights.' 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" *Mitchell v. W.T. Grant Co.,* 416 U.S. 600, 610 (1974) [citations omitted].

See also *Mathews v. Eldridge,* .... U.S. ...., 47 L. Ed.2d 18, 33 (1976).

The holding of the California Supreme Court, that Avco cannot obtain a vested right to the previously approved residential use of its property, absent a "building permit", constitutes a denial of due process. It should not be allowed to stand.

C. Recognizing a Vested Right to Complete the Development of Land Owned by the Harbor District, While Refusing to Recognize Avco's Vested Rights Claim, Constitutes a Denial of Equal Protection.

In its opinion the California Supreme Court summarily disposes of Avco's equal protection argument by stating that the grant of an exemption to the Harbor District is validated "on the basis of different facts." (17 Cal.3d at 801, n. 11.) The Court's statement is, however, directly contradicted by the facts as found by the trial court. (Finding of Fact No. 58, R. 386-387.)

The trial court found that the development of that portion of Tract 7479 sold to the Harbor District

was planned jointly with the development of the remainder of Tract 7479 retained by Avco; that the portion sold was to be improved concurrently with, and as a part of, the remainder of Tract 7479; that grading of the part sold was under the same grading permit covering the remainder of Tract 7479; and that the portion sold could not be graded apart from the remainder of Tract 7479. Moreover, the administrative record indicates that the approvals dealing with the portion sold were identical to those dealing with the remainder of Tract 7479.

In light of these findings of fact, it is impossible to escape the conclusion that Avco has been denied equal protection of the law. The remedy for such a consummated denial is to grant Avco the same right. *Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239 (1931).

VI
CONCLUSION.

For all of the foregoing reasons, probable jurisdiction should be noted.

Dated: December 27, 1976.

Respectfully submitted,

FULOP, ROLSTON, BURNS & MCKITTRICK,
A Law Corporation,
IRWIN M. FULOP,
LAWRENCE R. RESNICK,

Attorneys for Appellant
Avco Community Developers, Inc.

APPENDIX A.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California in Bank.

Avco Community Developers, Inc., Plaintiff and Appellant, v. South Coast Regional Commission et al., Defendants and Respondents. L.A. 30514 (Super. Ct. No. C 68386).

Filed: Aug. 25, 1976. Modified: Sept. 29, 1976.

We are confronted with the apparently irreconcilable conflict between the interests of a land developer who seeks to avoid compliance with a recently enacted law regulating its project, and the interests of the public in assuring development of the property in a manner consistent with the requirements of current law. Specifically, we must decide whether the developer of a subdivision may acquire a vested right to construct buildings on its land without a permit from the California Coastal Zone Commission (the commission) if it has subdivided and graded the property and made certain improvements on the land, such as installing utilities, but had not applied for or received a building permit for any structures on the land before February 1, 1973.

Section 27400 of the California Coastal Zone Conservation Act of 1972 (Pub. Resources Code, § 27000 et seq.), hereinafter called the Act, provides that on or after February 1, 1973, any person desiring to perform any development within the coastal zone (§ 27104) must obtain a permit from the commission. Section 27404, at the time relevant to the events in the present case, qualified this requirement by allowing

a builder to proceed after February 1 if he had obtained a vested right to do so by having secured a building permit and in good faith diligently commenced construction and performed substantial work in reliance thereon before the effective date of the Act.[1] In San Diego Coast Regional Com. v. See the Sea, Limited (1973) 9 Cal.3d 888, this court held that a builder who had obtained a building permit and performed substantial work thereunder prior to February 1, 1973, was exempt from the permit requirement of the Act.

Petitioner, Avco Community Developers, Inc. (Avco) owns 7,936 acres of land in Orange County which it is developing as the Laguna Niguel Planned Community. Of this total, 836 acres, known as the Capron property, was purchased by Avco in 1968. Approximately 473 acres of the Capron property lies within the coastal zone. Our concern in this proceeding is with 74 acres of the land within the permit area, designated as tract 7479.

In 1971, the county, at the instance of Avco, zoned 5,234 acres of the Laguna Niguel project, including tract 7479, as a "Planned Community Development" containing a total of 18,925 residential units. The development was to proceed according to "Planned Community District Regulations" enacted by the county. In 1972, a final map was approved for tract 7479, dividing it into 27 parcels, devoted largely to multiple residential uses. In that year the county issued a rough grading permit which did not refer to grading for any specific building site.

[1]Section 27404 was amended in April 1973 to provide that a builder was entitled to the exemption from the permit requirement if he had obtained the permit and performed the work before November 8, 1972.

Avco undertook a number of studies for the development of the tract, and proceeded to subdivide and grade the property. By February 1, 1973, pursuant to approvals issued for such purposes by the county, Avco had completed or was in the process of constructing storm drains, culverts, street improvements, utilities, and similar facilities for the tract as well as for the remainder of the Capron property. Under the county's building code, a permit could not be obtained until grading had been completed. Avco had not completed the rough grading by February 1, 1973, and it neither submitted building plans for the tract nor obtained a permit to construct any structures. Before that date, the company had spent $2,082,070 and incurred liabilities of $740,468 for the development of the tract; it is losing $7,113.46 a day, largely due to loss of anticipated rental value, as a result of its inability to proceed with construction of buildings on the tract.

Avco applied to the commission for an exemption from the permit requirements of the Act, claiming that it had a vested right to complete development, and, when its application was denied, sought a writ of mandate to compel the commission to grant the exemption.[2] The trial court, after a hearing in which the evidence consisted entirely of the record of the proceedings before the commission, declined to issue the writ.

The court found that the approvals granted by the county for the development of tract 7479 led Avco

[2]Avco initially applied to the South Coast Regional Commission for an exemption; upon denial of its application, it appealed to the statewide coastal commission, which affirmed the action of the regional commission.

to reasonably expect that it would be allowed to construct buildings on the tract "without further discretionary governmental approval," and that the subdivision improvements were installed in good faith reliance upon the county's actions. The court also found that Avco had a detailed plan for the buildings to be constructed on the tract. A model of the structures intended to be built on the tract had been completed in July 1971, and the court found that the maximum number, size and type of buildings "allowable" on the tract could be ascertained by reference to the tract map, the planned community district regulations, and the model.

Although the court opined that fairness suggested Avco be allowed to complete development of the tract in accordance with the map, the regulations and the model, nevertheless because Avco did not have a building permit the trial court felt compelled to hold that it did not have a vested right to construct the buildings, and thus was not exempt from the permit requirement of the Act. The court cited Spindler Realty Corp. v. Monning (1966) 243 Cal.App.2d 255, and San Diego Coast Regional Com. v. See the Sea, Limited, supra, 9 Cal.3d 888, as controlling.

Avco asserts that it had a vested right to construct buildings on tract 7479, that the commission is estopped to claim otherwise, and that the Act is unconstitutional.

Vested Rights

It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construc-

tion in accordance with the terms of the permit. (Dobbins v. City of Los Angeles (1904) 195 U.S. 223; Trans-Oceanic Oil Corp. v. City of Santa Barbara (1948) 85 Cal.App.2d 776, 784.) Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied. Here Avco asserts that it had a vested right to construct buildings on tract 7479 without permission from the commission because prior to February 1, 1973, when the coastal permit requirement took effect, it spent large sums of money to construct subdivision improvements and grade the tract, in reliance on several county authorizations, and that these improvements were undertaken and approvals issued for the purpose of constructing buildings. Thus, Avco relies upon the doctrine of vested rights as defined in the common law and in the Act itself.

Vested Rights Under Common Law

Evaluation of this claim requires a determination of the point in the development process at which a landowner can be said to have acquired a vested right to construct buildings on his land. The commission contends, subject to an exception to be discussed *infra*, that a builder may not acquire a vested right prior to the issuance of a building permit, whereas Avco asserts that in the context of a subdivision a developer's right to construct buildings vests when it has subdivided the land and installed subdivision improvements such as roads and utilities pursuant to governmental authorization. Amicus curiae appearing on behalf of Avco (Oceanic California Inc. and Half Moon Bay Properties, Inc.) argue for an even earlier time of vesting

in the case of a planned unit development, i.e., when such zoning is imposed on the developer's land.

In resolving this issue, we do not write on a clean slate. In Spindler Realty Corp. v. Monning, supra, 243 Cal.App.2d 255, a builder whose property was zoned for multiple residential use, sought and obtained a grading permit and other approvals from the City of Los Angeles to prepare a building site. The permit did not refer to the number, size and type of buildings to be erected on the site. In good faith reliance on these permits, Spindler graded the property and submitted building plans for the construction of a high rise apartment complex. It spent over $300,000 for development costs. However, before the building plans were approved, the property was rezoned for single family residential use.

Spindler contended, as does Avco here, that it had acquired a vested right to build multiple dwellings on the lot because, in good faith reliance on the existing zoning and the permits issued by the city, it had incurred substantial expenses to develop and grade the property. The court held that, while Spindler had a vested right to complete grading, it did not have a vested right to build the structures permitted by the prior zoning.

The court reasoned that Spindler knew when obtaining the grading permit that it would be required to secure a building permit in order to construct buildings, and that a grading permit is not the equivalent of a building permit even though a grading permit was required under the city's ordinances before a building permit could issue and such a permit would be granted only for building purposes. Further, opined the court,

although Spindler had proceeded in good faith for two years to complete its engineering and architectural plans for the apartment house complex in reliance on multiple residential zoning and the authorizations granted by the city, Spindler was taking a calculated risk in continuing its preparations at least from the time it learned, prior to completion of grading, that the city was considering rezoning the property.

The *Spindler* decision relied heavily on Anderson v. City Council (1964) 229 Cal.App.2d 79. There, the plaintiffs contended that they had acquired a vested right to build a service station on their property in spite of a change in the zoning law made after they purchased the land, the new enactment requiring a special permit to build a structure for that purpose. They asserted that they had relied, in purchasing the property, upon the assurances of city officials that construction of a service station was permitted, and had spent sums for preliminary development costs.

The *Anderson* court held that, since all of the landowners' acts had occurred prior to the issuance of a building permit, they could not have acted in reliance upon such a permit, and therefore could not have acquired vested rights in reliance thereon. The opinion observed that the plaintiffs had not cited a single California decision in which "a property owner has been held to have acquired a vested right against future zoning without having first acquired a ***building permit*** to construct a specific type of building and having ***thereafter*** expended a considerable sum in reliance upon said permit. Such authority would appear nonexistent for the reason that the vested rights theory is predicated upon estoppel of the governing body. . . .

Where no such permit has been issued, it is difficult to conceive of any basis for such estoppel." (229 Cal.App.2d at p. 89.)

Faced with realization that *Spindler* and *Anderson* have not been overruled or disapproved after this court denied hearings in both cases, it is contended they are distinguishable. Avco claims to have performed far more work on its property than the builder in *Spindler* because in addition to grading the tract it installed subdivision improvements. Moreover, there was reliance upon more governmental approvals than in *Spindler*, and upon specially enacted planned community zoning, whereas Spindler had merely depended upon existing zoning. As for *Anderson*, the landowners in that case, unlike Avco, had received no governmental approvals for improving their property.

Despite minor factual variations *Spindler* and *Anderson* are clearly controlling; they stand for the proposition that neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued. By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect when the permit is issued.

With commendable candor, the commission concedes that it does not deem a building permit to be an

absolute requirement under all circumstances for acquisition of a vested right. It suggests that in rare situations the government may grant another type of permit, such as a conditional use permit, which affords substantially the same specificity and definition to a project as a building permit, and that in such instances a builder might acquire a vested right even though the document was not designated a "building permit." We need not decide whether a governmental approval of the type referred to by the commission constitutes an exception to the rule pronounced in *Spindler* and *Anderson*, for the proposed exception would not apply here because none of the permits obtained related to identifiable buildings. Not only had Avco failed to apply to the county for permits for specific buildings by the date the requirements of the Act became effective, but the county was not advised of such elementary details as the dimension or height of the buildings to be constructed on tract 7479. The trial court's finding that "the maximum number, size and type of buildings that would be allowable to be constructed upon Tract 7479" could be ascertained by reference to the tract map, the regulations, and the model of the buildings does not support a conclusion to the contrary.

The model was prepared by Avco for its own use and was not submitted to the county.[3] An examination of the tract map and the regulations fails to disclose the number and size of the buildings to be constructed

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[3]Avco submitted photographs of the model, which was prepared in 1971, to the commission. It claims that the model is a "product and synthesis" of the information supplied to the county, but there is nothing in the record to indicate that Avco had supplied the county with detailed information concerning the buildings it intended to construct on the tract.

on the tract. The map merely designates certain areas for multiple residential use; the regulations for multiple residential structures are stated in the most general terms, and they do not refer to any identifiable buildings to be constructed on any specific lots.

Thus, on the date the Act became effective, the county did not know, much less had it approved, plans indicating such matters as the placement of the buildings to be built on the tract, the size of the proposed buildings, the number of apartments of specified size, or how high the buildings would rise, there being no legal height limitation for multiple residential units. Indeed, it was not even clear how many units would be built on the tract.[4]

Under these circumstances, it would be impossible to determine the precise scope of any purported right to construct buildings on the tract, and we would be compelled to deny the claim of a common law vested right even if we were to accept the theory that the *Spindler* rule is not binding in all circumstances.[5]

But, it is claimed, a subdivider is in a fundamentally different position than developers like those in *Spindler*

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[4]Avco claims that it intended to construct 1,300 units in the tract, although 1,900 units were "authorized." It does not point to any evidence as to how it determined the number of units "authorized" for the tract. In an application for a permit to the regional commission, Avco sought to build 1,600 units.

[5]It is not necessary to dwell at length upon Avco's assertion that approval of the tract map and the regulations constitutes the approval of construction of buildings under the Building Code of Orange County. Avco relies on section 7-9-130(c) of the code, which prohibits construction unless a subdivision map, standards of development or a conditional use permit are approved, but the code does not authorize construction without a building permit even if such preliminary approvals are granted.

and *Anderson* who build on a single tract of land, because the subdivider has obtained the approval of a subdivision map, which is asserted to be the "final discretionary approval" necessary in order to construct buildings on the land. That is, although Avco must still obtain a building permit, as well as approval of soil and geological reports, the issuance of such a permit is claimed to be merely a ministerial act since it must be issued by the county if the physical requirements of the building code are met.

The contention that Avco was entitled to a building permit because the county would have been compelled to issue it upon mere application has no merit. The Orange County Building Code (§ 302(a)) provides that a building permit may not issue unless the plans conform not only to the structural requirements of the code but to "other pertinent laws and ordinances." This provision codifies the general rule that a builder must comply with the laws which are in effect at the time a building permit is issued, including the laws which were enacted after application for the permit. (Brougher v. Board of Public Works (1928) 205 Cal. 426, 435; see Russian Hill Improvement Assn. v. Board of Permit Appeals (1967) 66 Cal.2d 34, 39; cf. Miller v. Board of Public Works (1925) 195 Cal. 477; and see cases collected in 50 A.L.R.3d 596, 602.) A landowner which has not even applied for a permit cannot be in a better position merely because it had previously received permission to subdivide its property and made certain improvements on the land.[6]

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[6]In Aries Development Company v. California Coastal Zone Conservation Commission (1975) 48 Cal.App.3d 534, the court

(This footnote is continued on next page)

Nor are we convinced by the importuning of amicus curiae that we should make an exception to the accepted rules set forth above because tract 7479 is part of a planned community development. Amicus suggests that a builder acquires a vested right to construct buildings at the time the government approves a planned unit development for the property. Planned unit development allows the construction of buildings on a tract free of conventional zoning so as to permit a cluster of structures, with increased density, on some portions of a tract, leaving the remainder as open space. (Orinda Homeowners Committee v. Board of Supervisors (1970) 11 Cal.App.3d 768, 772.) It is asserted that planned unit development serves the public interest because it provides an excellent means for implementing sound planning and preserving the environment, that a builder's preliminary investment in such a development far exceeds the investment required for a conventional subdivision, and that unless a landowner is assured that he can proceed with such a development in the manner initially approved by the government, he will not have the incentive to participate in a project of that type.

We have no reason to question the merits of planned unit development. However, the approval of such a plan merely imposes a special zoning on the property. It is beyond question that a landowner has no vested

applied the "final discretionary approval" test in determining that a landowner had not acquired vested rights to develop its property. The commission had contended in the trial court and in its opening brief on appeal that a vested right could arise without a building permit if the government had approved a specific project and "all final discretionary approvals" had been obtained. The court believed itself bound to decide the case on this theory because of the position the commission had adopted below and in its opening brief on appeal.

right in existing or anticipated zoning. (HFH, LTD. v. Superior Court (1975) 15 Cal.3d 508, 516; Morse v. County of San Luis Obispo (1967) 247 Cal.App.2d 600, 602; Anderson v. City Council, supra, 229 Cal. App.2d 79, 88-90.) We are aware of no authority compelling us to carve out an exception to this rule for planned unit zoning since the rule governs zoning of all other types. If there is to be a departure from settled rules for zoning of this character it must be provided by the Legislature.

Avco insists that the existence and scope of vested rights is a question of fact for the trial court, that we must accept the court's findings as true,[7] and that they lead inevitably to the conclusion that it has acquired a vested right to construct buildings on tract 7479 without a permit from the commission.

Even if we assume arguendo that a building permit is not required in order to acquire a vested right to construct particular buildings in every case, Avco cannot prevail. As we have seen, although the trial court found that Avco had a detailed plan for the

[7]The parties are in disagreement as to the scope of review of the trial court's findings. Avco contends that because conflicting inferences can be drawn from the evidence before the commission we must accept the trial court's findings as true even though the court made its determination on the basis of the record before the commission, without taking additional evidence. (Citing Environmental Coalition of Orange County v. Avco Community Developers, Inc. (1974) 40 Cal.App.3d 513, 524-525.) The commission relying on Aries Development Company v. California Coastal Zone Conservation Commission, supra, 48 Cal.App.3d 534, 545, asserts that since the only evidence before the trial court was the administrative record, which in turn consisted of documentary material, the findings of the trial court are not binding upon us. Any views expressed on this issue would be mere dictum because, as we shall conclude, Avco did not acquire a vested right even if we accept the trial court's findings.

buildings to be erected on the tract, the county was not aware of and had not approved such a plan, and the preliminary approvals which it did grant did not refer to any identifiable buildings. In view of this central premise, the further findings of the trial court that Avco reasonably expected that it would be allowed to construct "buildings" on the tract "without further discretionary governmental approval" and that by granting the preliminary approvals the county represented to Avco that it would be permitted to construct "buildings . . . upon obtaining building permits" are not sufficient to sustain a conclusion that Avco had secured a vested right to build structures which the county did not approve and as to which it had no detailed information.

Our conclusion that Avco has not acquired a vested right under the common law to proceed with its development absent a permit from the commission is not founded upon an obdurate adherence to archaic concepts inappropriate in the context of modern development practices or upon a blind insistence on an instrument entitled "building permit."

If we were to accept the premise that the construction of subdivision improvements or the zoning of the land for a planned community are sufficient to afford a developer a vested right to construct buildings on the land in accordance with the laws in effect at the time the improvements are made or the zoning enacted, there could be serious impairment of the government's right to control land use policy. In some cases the inevitable consequence would be to freeze the zoning laws applicable to a subdivision or a planned unit development as of the time these events occurred.

Thus tracts or lots in tracts which had been subdivided decades ago, but upon which no buildings have been constructed could be free of all zoning laws enacted subsequent to the time of the subdivision improvement unless facts constituting waiver, abandonment, or opportunity for amortization of the original vested right could be shown. In such situations, the result would be that these lots, as well as others in similar subdivisions created more recently or lots established in future subdivisions, would be impressed with an exemption of indefinite duration from the requirements of any future zoning laws. To illustrate: let us hypothesize that ecause of mounting costs, decreasing demand or innumerable other potential causes, Avco does not build multiple residential units on tract 7479 for a number of years. If we were to accept its premise, the tract would be exempted not only from the current requirements of the Act, but from all zoning laws enacted for an indefinite period. It is no response to these inherent evils to assert that this builder presently intends to construct its multiple residential units expeditiously.

Vested Rights Under the Act

Avco asserts that even if it does not have a vested right to construct buildings on the tract under common law principles, it nevertheless has such a right under the Act, as construed in San Diego Coast Regional Com. v. See the Sea, Limited, supra, 9 Cal.3d 888.

In *See the Sea*, a property owner *who had obtained a building permit* and commenced construction on the site prior to February 1, 1973, contended that it was exempt from the permit requirement. We held that builders who had performed substantial lawful construc-

tion on their projects before that date, pursuant to a building permit, were not required to obtain a permit from the commission. The opinion reasoned that if the Act had been intended to require a commission permit for completion of construction which had been commenced prior to February 1, it would have the effect of imposing a moratorium on all construction in the permit area, and that such a moratorium was not intended by the Act.[8]

Avco's theory appears to be principally that because some portions of the opinion in *See the Sea* refer to "substantial lawful construction" of a project without referring to construction pursuant to a building permit, we were interpreting the Act to allow an exemption even though no building permit has been acquired so long as any work that had been performed was done lawfully. Clearly, however, *See the Sea* did not hold that a building permit was not required for an exemption under the Act. The case was concerned with whether construction by a builder between November 8, 1972, and February 1, 1973, pursuant to a building permit, could be considered in determining whether a vested right had been obtained, and it did not purport to decide the issue involved in the present case. Indeed, the opinion makes it clear that even the acquisition

[8]The opinion states, "[I]t would be unjust now to imply a permit requirement for builders who, like defendant, relied on the absence of an express requirement. Even though a particular construction project might actually conform to the act's objectives, construction would have to be interrupted while a permit is sought." (9 Cal.3d at p. 893.)

of a building permit before February 1, 1973, was not sufficient to gain an exemption, but that substantial construction under the permit was required in order to qualify for an exemption. (See also California Central Coast etc. Conservation Com. v. McKeon Constr. (1974) 38 Cal.App.3d 154.)

Estoppel

Avco asserts that even if it does not have a vested right to build without a permit from the commission, it must nevertheless be allowed to proceed with construction because the commission is estopped to enforce the requirements of the Act. This claim is founded upon the so-called "Beach Agreement" entered into between the Orange County Harbor District and Avco, and approved by the state. Under this agreement, Avco consented to sell the county 11 acres of sandy beach at a price substantially below fair market value and an additional 23 acres for parking at fair market value, and to dedicate certain land for access purposes. The district was to use the property for a public park. The sale was conditioned upon the issuance of certain approvals by the county,[9] the enactment of a bill by the Legislature releasing any public rights in the property, and confirmation of the agreement by the State Lands Commission. The approvals were granted, and the bill was passed.

Both the Beach Agreement and the bill recite that there is a disagreement between the county and Avco

[9]For example, the county was required to approve planned community zoning, and to issue a grading permit.

with respect to whether the public had acquired prescriptive rights in some of the land purchased by the county, and that the sale is intended to resolve these differences without litigation. Avco asserts that it agreed to sell the property to the Orange County Harbor District in exchange for a commitment by the county and the state that it would be permitted to develop tract 7479 in accordance with the planned community zoning, the regulations and the tract map, that it expended large sums of money in reliance on this promise and that the commission is estopped to apply the requirements of the Act to the development. Predictably, the commission counters this assertion by claiming that the Beach Agreement represented the resolution of a dispute over public prescriptive rights in the land conveyed and has no reference to development of any remaining property.

The trial court declined to decide whether the commission had violated the Beach Agreement because the court concluded that the state's police power overrides any obligation of the state to perform the Beach Agreement, and that the commission was not estopped to require Avco to obtain a permit under the Act.

We agree with this aspect of the trial court's conclusion. Land use regulations, such as the Act, involve the exercise of the state's police power (Miller v. Board of Public Works, supra, 195 Cal. 477, 486-489), and it is settled that the government may not contract away its right to exercise the police power in the future. (Caminetti v. Pac. Mutual L. Ins. Co.

(1943) 22 Cal.2d 344, 362; Laurel Hill Cemetery v. City and County (1907) 152 Cal. 464, 475; Maguire v. Reardon (1916) 41 Cal.App. 596, 601-602.) Thus, even upon the dubious assumption that the Beach Agreement constituted a promise by the government that zoning laws thereafter enacted would not be applicable to tract 7479, the agreement would be invalid and unenforceable as contrary to public policy.

Constitutionality of the Act on Its Face and as Applied

Avco argues that the Act amounts to a taking of private property for public use without just compensation and that, because the Act was an initiative measure, it deprived Avco of property rights without notice and hearing. Our recent decisions in State of California v. Superior Court (Veta) (1974) 12 Cal.3d 237, 252-255, and San Diego Building Contractors Association v. City Council (1974) 13 Cal.3d 205, 210-218, provide a complete response to this contention.[10]

Finally, Avco insists that it has been denied equal protection of the law because landowners in other counties who are in the same position would be entitled to an exemption; it does not have a building permit

[10]It is not necessary to discuss Avco's claim that the Act fails to provide adequate standards for determining whether a permit should be granted. This proceeding does not concern the denial of a permit by the commission, but only the denial of an exemption from the permit requirement. Also see CEEED v. California Coastal Zone Conservation Commission (1974) 43 Cal.App.3d 306, 325-329, in which it was held that the Act did not constitute an unlawful delegation of legislative power.

because the Orange County Building Code requires that grading be completed before a building permit may be issued. The laws of other governmental entities allow a grading permit and a building permit to be issued simultaneously. Thus, it is claimed, a landowner who had performed the same amount of work on his land but whose development was located in a county in which simultaneous permits are issued, would be exempt from the permit requirement of the Act, whereas Avco is subject to that requirement.

However, a builder who has obtained a building permit is not comparable to Avco since he has at least obtained approval of a specific structure which complies with the law in effect at the time the permit is issued. Moreover, it cannot be assumed that such a builder would be entitled to a vested right if he did not perform substantial work under the permit. (See San Diego Coast Regional Com. v. See the Sea, Limited, supra, 9 Cal.3d 888, 893.)[11]

Our conclusion that no vested right inures to proceed with development of tract 7479 does not strip this land of all value. The result is merely that Avco, like all other landowners in the coastal zone who have not acquired a vested right to develop their property, must apply to the commission for a permit and, if the application is denied, then the desired buildings on the tract cannot be constructed during the period

[11]Another argument of Avco based upon equal protection grounds is also without merit. The Orange County Harbor District secured an exemption from the commission to complete construction of certain facilities, such as a lifeguard station and public restrooms on the land it purchased from Avco for a park. There has been no denial of equal protection merely because the district, on the basis of different facts, was granted an exemption.

the Act is in effect. As we pointed out in State of California v. Superior Court (Veta), supra, 12 Cal.3d 237, 253, the Act is only an interim measure designed to assure that valuable coastal zone resources are not irreversibly committed during the time the commission is developing a comprehensive plan for the orderly development of the coast, and the permit requirement will automatically be repealed 91 days after adjournment of the 1976 regular session of the Legislature.

The judgment is affirmed.

Mosk, *J.*

WE CONCUR:

Wright, *C.J.*
McComb, *J.*
Tobriner, *J.*
Sullivan, *J.*
Clark, *J.*
Richardson, *J.*

APPENDIX B.

Judgment Denying Peremptory Writ of Mandamus.

Superior Court of the State of California for the County of Los Angeles.

Avco Community Developers, Inc., a California corporation, Petitioner, vs. South Coast Regional Commission, an agency of the State of California; and California Coastal Zone Conservation Commission, an agency of the State of California, Respondents. No. C 68386.

Filed: Aug. 5, 1974.

This matter came on for trial before this Court on April 30, May 6, May 16 and June 11, 1974 in Department 88 thereof, the Honorable David N. Eagleson, Judge Presiding.

Marvin G. Burns of Fulop, Rolston, Burns & McKittrick and Michael Abbott of Stephens, Jones, La Fever & Smith appeared as attorneys for Petitioner and Evelle J. Younger, Attorney General, and Carl Boronkay, Assistant Attorney General, by Donatas Januta, Deputy Attorney General, appeared as attorneys for Respondents. The record of the administrative proceedings having been received into evidence and examined by the Court, no additional evidence having been received by the Court, arguments having been presented, and the Court having made Findings of Fact and Conclusions of Law, which have been signed and filed,

IT IS ORDERED THAT:

1. The Petition filed in this action for peremptory Writ of Mandamus is denied; and

2. Respondents shall recover their costs in this action, in the amount of $.....

Dated: Aug. 5, 1974.

/s/ David N. Eagleson
JUDGE OF THE SUPERIOR COURT

Judgment entered on ....., 1974 in Judgment Book ....., Volume ....., Page .....

....., Clerk

By .....
Deputy Clerk.

APPENDIX C.

Notice of Appeal.

Superior Court of the State of California for the County of Los Angeles.

Avco Community Developers, Inc., a California corporation, Petitioner, vs. South Coast Regional Commission, an agency of the State of California, and California Coastal Zone Conservation Commission, an agency of the State of California, Respondents. No. C 68386.

Filed: Aug. 12, 1974.

TO RESPONDENTS AND TO THEIR ATTORNEYS OF RECORD, EVELLE J. YOUNGER, ATTORNEY GENERAL, and DONATAS JANUTA, DEPUTY ATTORNEY GENERAL, OF THE STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that Petitioner hereby appeals from that certain judgment entered herein on August 5, 1974 in Book 6944, Page 59 of the records of the above entitled Court.

DATED: August 9, 1974.

FULOP, ROLSTON, BURNS &
McKITTRICK
By /s/ Lawrence R. Resnick
Lawrence R. Resnick
Attorneys for Petitioner

APPENDIX D.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
San Francisco, California 94102

Sept. 29, 1976.

I have this day filed Order.

REHEARING DENIED

In re: L.A. No. 30514, AVCO Community Developers vs. South Coast Regional Comm.

Respectfully,

G. E. BISHEL, Clerk

APPENDIX E.

Notice of Appeal to the Supreme Court of the United States.

In the Supreme Court of the State of California.

Avco Community Developers, Inc., A California Corporation, Appellant, vs. South Coast Regional Commission, an agency of the State of California; and California Coastal Zone Conservation Commission, an agency of the State of California, Appellees. L.A. No. 30514.

Filed: Nov. 24, 1976.

NOTICE IS HEREBY GIVEN that Appellant, AVCO COMMUNITY DEVELOPERS, INC., hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of California, entered in the above-entitled matter on September 29, 1976, which order denied appellant's Petition for Rehearing after this Court's affirmance of the judgment of the trial court.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED: November 23, 1976.

FULOP, ROLSTON, BURNS &
McKITTRICK, a Law Corporation
IRWIN M. FULOP
LAWRENCE R. RESNICK
KENNETH B. BLEY
By /s/ KENNETH B. BLEY
Kenneth B. Bley
Attorneys for Appellant, AVCO
COMMUNITY DEVELOPERS, INC.

AFFIDAVIT OF SERVICE BY MAIL

State of California, County of Los Angeles—ss.

I, NAN S. KALISH, certify and declare that I am a citizen of the United States, over the age of 18 years, employed by the Law Corporation of Fulop, Rolston, Burns & McKittrick, 9665 Wilshire Boulevard, 7th Floor, Beverly Hills, California, in the County of Los Angeles, State of California, and not a party to the above-entitled cause.

On November 23, 1976, I served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the parties required to be served by depositing a true copy thereof to each, in a sealed envelope with postage thereon fully prepaid, in a mailbox regularly maintained by the United States Post Office, City of Beverly Hills, State of California, addressed as follows:

Evelle J. Younger, Attorney General
Carl Boronkay, Assistant Attorney General
Roderick Walston, Deputy Attorney General
Donatas Januta, Deputy Attorney General
6000 State Building
San Francisco, California 94102

John Roger Beers
Ballard Jamieson, Jr.
Natural Resources Defense Council
664 Hamilton Avenue
Palo Alto, California 94301

Laurens H. Silver
Sierra Club Legal Defense Fund, Inc.
311 California Street, Suite 311
San Francisco, California 94104

Maribeth Halloran
345 Franklin Street
San Francisco, California 94102

Clerk's Office
Court of Appeal of the State of California
Second Appellate District
3580 Wilshire Boulevard, Suite 301
Los Angeles, California 90010

The Honorable David N. Eagleson
Judge of the Superior Court
County of Los Angeles
Los Angeles, California 90012

Ellman, Passovoy & Burke
1 Ecker Building
Ecker & Stephenson Street
San Francisco, California 94105

/s/ Nan S. Kalish
Nan S. Kalish

Subscribed and Sworn to Before Me
this 23rd day of November, 1976.

/s/ Alice J. Fitch
Notary Public in and for
said County and State

[SEAL]

76-888

Supreme Court, U. S.
FILED
1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. A-450

AVCO COMMUNITY DEVELOPERS, INC.,
Appellant,

vs.

SOUTH COAST REGIONAL COMMISSION,
an agency of the State of California, and
CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION,
an agency of the State of California,
Appellees.

On Appeal from the Supreme Court of
the State of California

Motion to Dismiss or Affirm

EVELLE J. YOUNGER
Attorney General
R. H. CONNETT
Assistant Attorney General
RODERICK WALSTON
DONATAS JANUTA
Deputy Attorneys General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-0269
Attorneys for Appellees.

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. A-450

AVCO COMMUNITY DEVELOPERS, INC.,
Appellant,

vs.

SOUTH COAST REGIONAL COMMISSION,
an agency of the State of California, and
CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION,
an agency of the State of California,
Appellees.

On Appeal from the Supreme Court of the State of California

Motion to Dismiss or Affirm

California Coastal Commission, successor in interest under California Public Resources Code section 30331 to appellees South Coast Regional Commission and California Coastal Zone Conservation Commission, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss this appeal or to affirm judgment of the Supreme Court of California.

The two questions presented in the Jurisdictional Statement filed by appellant are so insubstantial as not to need

further argument. Moreover, one of the two, appellant's claim to a vested right to build, is foreclosed by a previous decision of this Court. In *Dobbins v. Los Angeles*, 195 U.S. 223 (1904), this Court held that if a person receives a permit allowing him to proceed with construction of a project, and thereafter in good faith reliance on said permit does so proceed, then such person has a vested right to complete *the project which had been authorizd by said permit* in spite of subsequent changes in law prohibiting such project. This is the same rule which the California Supreme Court applied in this case. The second question is based on facts alleged by appellant which are not substantiated in the record of the proceedings in the courts below.

QUESTIONS PRESENTED

Appellant, Avco Community Developers, Inc., has not fairly stated the questions. The two questions that appellant presents in its Jurisdictional Statement are properly stated as follows:

(1) May a vested right exemption from having to comply with subsequent changes in law applicable to construction extend beyond the scope of the governmental permit being relied upon or is the exemption limited to whatever was authorized under such permit? A developer, who has received governmental permits which allow him to do no work on his land beyond grading and subdividing it into lots, thereafter desires to construct residential buildings and other structures on that land. Must such a developer comply with the law in effect at the time he applies for his construction permits, or is he entitled to build whatever the prior law would have allowed despite the fact that he neither applied for nor received any construction permits under the prior law?

(2) Is it a denial of equal protection to deny a vested rights claim of exemption to one party when recognizing such a claim by another party for an adjoining parcel of land involving different facts? Moreover, can a court take cognizance of the equal protection issue when all the facts pertaining to the other party's claim are not introduced at either the trial court or appellate proceedings?

STATEMENT OF THE CASE

The proceedings in the California Supreme Court, and prior to that in the lower courts of California, involved review of an administrative decision by the California Coastal Zone Conservation Commission (hereinafter sometimes referred to as "Coastal Commission"). Appellant had applied, based on an asserted claim of having established vested rights, for an exemption from the permit requirements of the California Coastal Zone Conservation Act of 1972. Appellants' claim for exemption was denied and it is judicial review of such denial that appellant is pursuing in this proceeding. Said Act of 1972 was an interim statute which placed restrictions on development in California's coastal zone for an interim planning period while a comprehensive plan for the regulation and guidance of orderly development of the California coast was prepared. Such plan has now been prepared and has been adopted as California Public Resources Code sections 30,000 et seq. The interim Act of 1972 from whose permit provisions appellant sought to be exempted has now terminated by its own terms as of January 1, 1977, and is no longer in effect. (Former Public Resources Code section 27650).

The herein litigation constitutes judicial review of an administrative decision. Neither side supplemented the record of the agency proceedings as provided under California Code of Civil Procedure section 1094.5. Consequently,

judicial review has been limited to, and the sole evidence before the California courts and before this Court consists of, the administrative record of the proceedings before the California Coastal Commission.[1]

Appellant incorrectly and misleadingly states in its Jurisdictional Statement that it was not seeking a vested rights exemption to construct specific *buildings,* but that it was instead seeking a vested rights exemption to put the land to specific *uses* consistent with the zoning that was in existence on the property prior to the pasage of the Coastal Act of 1972. The fact is that in the administrative proceeding, and in the litigation before the California courts, the only dispute and the specific issue between the parties has been whether or not appellant Avco is exempted from the permit requirements of the Act of 1972 for constructing on the subdivided and graded land:

(1) A specific number of residential structures that appellant claimed that it had plans for;

(2) A private beach club facility; and

(3) A parking lot.

Throughout these proceedings, up to now, appellant consistently claimed that it had a vested right to construct these specific buildings and structures. Only now, after having lost in the California courts, appellant phrases its claim for a vested right exemption in terms of a vested right to a "use", and states that the California Supreme Court is guilty of an "oversight" in not having recognized this. Yet, if we look at the preeedings before the California Coastal Commission and before the California courts, the "use" to which they claim a vested right happens to be to

1. References hereafter to pages in the administrative record shall be made as follows: "AR 32" shall mean page 32 of the administrative record.

construct the above three specific buildings and structures on the land. There has been no "oversight" by the California Supreme Court in this case which has been thoroughly briefed and argued before one administrative agency and thereafter before three separate California trial and appellate courts. None of these Courts ruled on the question of a vested rights claim to a "use" for the reason that such a question was not presented to them.

A vested right to be exempt from changes in law has to "vest" on or before the effective date of whatever new law is sought to be avoided. With respect to the Coastal Act of 1972, that date is November 8, 1972. Additionally, the California Supreme Court has also recognized a statutory "vested rights" exemption, really in the nature of a "grandfather clause", under the terms of the Act of 1972 itself. See California Supreme Court opinion below, 17 Cal.3d at 788-799. The cut-off date for the statutory exemption is February 1, 1973. Consequently, appellant's claim to a "vested rights" exemption, common law or statutory, has to be evaluated in terms of events and facts that existed prior to November 8, 1972, and February 1, 1973, respectively.

The California Supreme Court correctly stated the applicable law in the opinion below, 17 Cal.3d at 791:

> "It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. (*Dobbins v. City of Los Angeles* (1904) 195 U.S. 223; *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776, 784). Once a landowner has secured a vested right the government may not,

by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied."

Since the permits which Avco had received for work on the land did not authorize any work beyond grading and subdividing it, and Avco had not done any work on the land beyond commencement of grading and subdividing, the California Supreme Court held that any vested right could not extend beyond that either.

The second question which Avco has presented in its Jurisdictional Statement is its assertion that because the Coastal Commission granted an exemption to the County Harbor District to complete public recreational facilities on an adjoining tract, it amounts to a denial of equal protection to deny Avco an exemption to build the structures and buildings on its tract. There are two difficulties with Avco's position on this issue. *First,* the County Harbor District's claim for exemption was a separate claim, based on separate facts, and the subject of a separate administrative proceeding. The record of that administrative proceeding is not part of the judicial record under review here with respect to Avco's claim for exemption. Consequently, on the basis of the record herein, it is not possible to make a fully-reasoned judgment on Avco's claim of denial of equal protection since we do not have all the facts as they were presented in the Harbor District's claim for exemption. Avco could have but did not offer to introduce the record of the Harbor District's exemption proceedings in this litigation. *Second,* to the extent that there is some partial information in the herein record concerning the County Harbor District's claim, certain factual differences justifying different treatment of the two claims are apparent and indicate that other factual differences probably also existed.

THE QUESTIONS PRESENTED BY APPELLANT ARE SO INSUBSTANTIAL AS NOT TO REQUIRE FURTHER ARGUMENT. MOREOVER, ONE OF THEM IS FORECLOSED BY A PRIOR DECISION OF THIS COURT AND THE OTHER IS BASED ON ASSERTED FACTS WHICH ARE NOT IN THE RECORD OF ANY OF THE PROCEEDINGS IN THE COURTS BELOW

The Court should note that Appellant itself has considered the federal constitutional questions which it raises in its Jurisdictional Statement so insubstantial that appellant admits that after having raised them in lower court proceedings, appellant thereafter virtually abandoned them when the matter came up before the California Supreme Court. If the Court will look to Appellant's Jurisdictional Statement at p. 8 thereof, appellant discloses that when the matter came up before the California Supreme Court appellant did not pursue the constitutional questions except that "the due-process question was specifically brought to the Court's attention *in a letter* immediately *after oral argument.*"

A. The California Supreme Court's Ruling on Appellant's Claim to Vested Rights is a Correct and Fair Ruling and Follows a Prior Decision of This Court

Appellant Avco has numerous tracts that it is developing in the same area of Orange County, including the subject Tract 7479. Some of these tracts, such as Tract 6988 [AR 352], Appellant Avco is subdividing and grading for the purpose of creating individual lots to be sold to other purchasers. Other tracts, such as the herein tract 7479, Avco asserts that its intent has been not only to create lots, but to also thereafter construct buildings on those lots, and only then sell off the property after the buildings have been constructed on the lots.

The *manufacture of lots* is a separate and distinct process from the construction of buildings on those lots thereafter.

See, e.g., *Avner v. Longridge Estates* (1969) 272 Cal.App.2d 607. The manufacture of lots generally consists of grading the land, building roads to provide access to the land, bringing in utility lines for future hook-ups, and delineating individual lot lines. Appellant Avco had not gotten beyond the manufacture of lots stage for Tract 7479 either in the scope of governmental permits it has received for said land, or in the type and amount of work actually performed on the land.

In other words, if someone went to all the governmental offices having jurisdiction over Tract 7479 as well as Tract 6988, and examined Avco's applications for permits and the permits that have actually been issued, one would see that no governmental permits had either been requested by or issued to Avco, for either tract, beyond the manufacture of lots. Similarly, if one were to examine the physical state of the land in Tract 7479 and in Tract 6988, one would see no difference in the type or amount of activity on one and the other, and in both cases one would conclude that Avco was merely subdividing the land, i.e., manufacturing lots. One would have to conclude from all such available objective evidence that Avco's intentions did not differ for one tract from that of the other.

Yet, Avco now seeks a vested rights exemption to build buildings and structures on one of these tracts without having those buildings and structures comply with existing law, although Avco concedes that no such exemption is available for the other tract. The reason why Avco asserts it is entitled to such different treatment for one tract and the other is that for the one tract, Avco states that within its own *subjective state of mind,* i.e., within its own corporate structure, Avco had the previously undisclosed intent to build structures on it while on the other tract it did not have such intent.

Avco has sought an exemption, based on its claim of vested rights, from having to comply with existing law, for structures which no government agency to date has seen much less approved.

The concept of vested rights is based on the equitable doctrine of estoppel: if the government causes another party to justifyably *rely* on its actions, then the government may be prevented from thereafter changing its position to the other party's detriment. But there must first be *reliance* on the government's actions, and therefore there must be government action. Such action consists of the government permits issued authorizing the party to commence construction. In this case the only authorizations issued to Avco do not go beyond grading and subdividing of its land. Consequently, there can be neither justifiable reliance, nor estoppel, nor vested rights, beyond grading and subdividing of the land. Estoppel is grounded on the objective conduct of the party sought to be estopped. Here Avco seeks to estop government not on the basis of government's conduct, but rather on the basis of its own subjective state of mind, its own previously unrevealed intentions.

How can the government be estopped from regulating, according to existing law, the construction of buildings which it has never seen, much less authorized?

This is a fair and a long-standing rule. The cases which the California Supreme Court cited in its opinion below have long been the rule. Appellant, a sophisticated developer, was very well aware of the extent to which it could rely, and beyond which its subjective intents would be subject to newly enacted laws. Indeed, the record discloses that even before the Coastal Act of 1972 was passed, while similar proposals were being considered by the California

legislature, Avco made express provisions in its own future plans for the contingency of such a new statute and its effect on Avco's future plans for the land. See the administrative record at pp. AR 1354 and 1358-1359, where appellant Avco stated its intent to amend its obligations to subsidize property assessments for its tracts in the event any Coastal legislation affecting its land was passed, and thereafter did amend such obligations.

B. Appellant Has Not Stated a Valid Claim for Denial of Equal Protection Due to the Recognition of a Vested Rights Exemption for the Development of Another Parcel by the County Harbor District

It is axiomatic that there is no denial of the constitutional right to equal protection if two persons situated differently are treated differently. The Coastal Commission denied Avco's claim herein for vested rights and recognized the County Harbor District's claim to such vested rights for another parcel of property based on different facts. Additionally, although all the facts that pertain to the Harbor District's claim have at all relevant times been within Avco's possession, Avco has never sought to introduce them in these proceedings. The inference must therefore be drawn that such facts if introduced would have detracted from Avco's equal protection claim rather than supported it.

The County Harbor District's parcel consists of 34 acres [AR at pp. 211-213] adjacent to Avco's herein Tract 7479. Said 34 acre parcel was purchased by the County from Avco for the sum $1,677,960 and the County also contracted to pay Avco an additional $883,292 to construct certain improvements thereon. Such improvements essentially consisted of preparing the beachfront parcel for

park and recreation use by constructing a road and parking lot together with restrooms, lifeguard stands, one concession stand, one gate house, and associated landscaping, lighting, irrigation, and utilities.

Avco, as the County's agent under said contract, applied for a vested rights exemption for said parcel on behalf of the County. Consequently, Avco has at all times possessed all the facts pertaining to that vested rights claim. Yet, the only item of evidence that Avco has submitted in these proceedings on the Harbor District's claim is a copy of an unsigned and unexecuted document contained in the administrative record at pp. AR 211-218, which appears to be a draft of a proposed resolution of South Coast Regional Commission to grant that parcel an exemption.

From this document it appears, however, that work on the buildings and structures of the County Harbor District's tract was well along in progress, with some of the individual structures already completed as of the two dates relevant to a claim of exemption. See page AR 212 which states that the road and parking lot were completed on October 28, 1972. Landscaping, irrigation, and lighting were completed on October 27, 1972. One restroom and one gatehouse were completed on February 7, 1973. Work on the remaining structures was apparently in progress as of the date the claim for exemption was filed.

Avco in its Jurisdictional Statement claims that the grading for the two parcels had been done jointly. But the fact is that in the case of the Harbor District's parcel, much more than just grading had been completed or was in progress as of the two relevant dates. Avco's Tract 7479, on the other hand, had not gone beyond grading.

Additionally, Avco asserts that no building permits, i.e., construction permits for structures, had been issued for

the Harbor District's parcel. The answer to this has to be two-fold. *First,* the evidence in the record concerning the Harbor District's parcel says nothing concerning whether a building permit was issued or not. But since structures were being built, absent any evidence to the contrary, one must assume that the law had been complied with and all necessary permits had been obtained. *Second,* a "building permit" as such probably was not issued for the structures being built on the Harbor District's parcel and most likely none was required. The practice in most municipalities and counties in California is that permits such as building permits are usually not required for the municipalities' own projects. In other words, a county does not normally issue itself a construction permit or a building permit. Instead, when the county's governing body reviews, approves, and authorizes its own project, it performs a review equivalent to and often much more exacting than when a county agency reviews a private applicant's application for a construction permit. In fact, the administrative record at page AR 211 indicates that the county passed a resolution authorizing the development on September 21, 1971. This would appear to be the usual type action taken by a governmental entity in authorizing one of its own projects. Consequently, even if Avco should be correct that no building permit was issued for the structures being built on the county's parcel, and as we indicated, because of the incompleteness of the record we cannot even be sure of this, it would nonetheless appear that action amounting to the equivalent of issuing a building permit was taken by the County.

From the record in its present state the following facts appear to be true. Avco received county authorization to grade and subdivide its land, was in the process of doing

so, but had neither applied for nor received any permits to constuct any buildings or structures and had not commenced any such construction. The Harbor District's parcel received county authorization not only for grading the parcel, but also to build the structures and facilities necessary to make it into a recreational and park area, and the work was proceeding as of the relevant dates herein. Consequently, an exemption was granted to the County to complete all such structures and facilities. As far as the evidence in the record reveals, if the two parcels have been treated differently, it is because the underlying facts for each parcel are different. There has been no denial of equal protection.

CONCLUSION

For all the foregoing reasons, we respectfully move this Court to dismiss this appeal or, in the alternative, to affirm the judgment of the California Supreme Court entered in this case for the reason that the questions presented in the Jurisdictional Statement are so insubstantial as not to need further argument.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General
R. H. CONNETT
Assistant Attorney General
RODERICK WALSTON
DONATAS JANUTA
Deputy Attorneys General
Attorneys for Appellees.

Supreme Court, U. S.
FILED
FEB 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-888

AVCO COMMUNITY DEVELOPERS, INC.,

Appellant,

vs.

SOUTH COAST REGIONAL COMMISSION, an agency of the State of California, and CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION, an agency of the State of California,

Appellees.

On Appeal From the Supreme Court of the State of California.

RESPONSE TO MOTION TO DISMISS OR AFFIRM.

FULOP, ROLSTON, BURNS & MCKITTRICK,
A Law Corporation,
IRWIN M. FULOP,
LAWRENCE R. RESNICK,
9665 Wilshire Boulevard,
Seventh Floor,
Beverly Hills, Calif. 90212,
(213) 878-2654, 278-6500,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

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AVCO COMMUNITY DEVELOPERS, INC.,

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SOUTH COAST REGIONAL COMMISSION, an agency of the State of California, and CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION, an agency of the State of California,

Appellees.

On Appeal From the Supreme Court of the State of California.

RESPONSE TO MOTION TO DISMISS OR AFFIRM.

I.
Introduction.

Appellees, SOUTH COAST REGIONAL COMMISSION and CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION (the "Commissions"), have filed a Motion to Dismiss or Affirm in the above-entitled matter. Appellant, AVCO COMMUNITY DEVELOPERS, INC. ("Avco") contends that the Commissions misunderstand Avco's legal theory on appeal and that the Motion to Dismiss or Affirm contains misleading statements.

The remainder of this brief will address these issues seriatim.

II.

Avco Has a Vested Right to Previously Approved Uses of Tract 7479.

In its Jurisdictional Statement at 9-17 Avco contended that a developer who has substantially and in good faith relied on governmental approvals of specific uses and densities for the construction of a residential development, but where no permit to construct specific buildings has been issued, nevertheless has a vested right to those previously approved uses. This is also the essence of the first question presented to this Court. (Jurisdictional Statement at 4.)

The Commissions assume the validity of their conclusion that it is impossible to gain such a vested right absent a building permit. (Motion to Dismiss or Affirm at 2.) In doing so they disregard both the existence and the rationale of the several cases to the contrary cited in the Jurisdictional Statement at 11-16.

The Commissions' logical fallacy of assuming the conclusion has also led them to argue that Avco did no more than manufacture lots under the permits granted and therefore could not have a vested right to anything more. (Motion to Dismiss or Affirm at 7-8.) Avco was in precisely the same position as the developer in *Meuser v. Smith*, 74 Ohio L. Abs. 417, 141 N.E.2d 209 (1956). In *Meuser* the developer bought eleven acres of unzoned property intending to use it as a trailer park. The developer then filed a development plan for the park and received a building permit for one of the utility buildings to be constructed on it. Construction work was started (to the extent of excavating and constructing footers) when it was

halted by a temporary restraining order. Thereafter the property was rezoned for agricultural and residential uses, neither of which allowed the property to be used as a trailer park. The court upheld the developer's contention

> ". . . that by starting construction they did establish an 'existing' use within the meaning of the applicable regulation and enabling statutes; that they acquired a vested right to complete such and use the same under the 'due process' clause of the United States Constitution, Amend. 14." 141 N.E.2d at 211.

In other words the developer in *Meuser* had received a permit which allowed the construction of one of the improvements required to make the land suitable for its ultimate use. The utility building had no value standing alone; its value lay in the role it was to play as part of a completed trailer park. The developer's reliance on the permit, combined with the existence of a development plan, was held sufficient to grant the owner a vested right to the *use* of his property which he had intended.

Avco is in precisely the same position. The specific use of each lot, and the maximum intensity of that use, within Tract 7479 had received prior governmental approval. By grading and constructing subdivision improvements on Tract 7479, Avco had commenced the construction of its residential community. Like the developer in *Meuser*, Avco had begun construction of improvements required to effectuate the intended use of Tract 7479 as a residential development. On these facts, combined with the numerous approvals which had been previously granted to Avco, Avco contends

that, like the developer in *Meuser,* it has established an existing use and has a vested right to complete Tract 7479 for the residential use previously approved, up to the densities previously approved.

Avco's contention that it has a vested right to previously approved uses of Tract 7479 does not mean that the property is completely free from other constraints or controls which might be required to protect the public under the government's police powers. Avco is in complete agreement with the statement of the applicable law as found in 2 Antieau, *Municipal Corporation Law* Section 16A.12 at 16A-25 (1973):

> "One in possession of a valid permit should be aware that at any subsequent date he can be exposed lawfully to those police power controls, such as regulations found in fire prevention ordinances, building codes etc., which are necessary to protect the public health, morals, welfare or safety." [Footnote omitted.]

Avco contends now, as it has contended in the past, that the public safety will be adequately protected upon the issuance of building permits because no such permit will be issued unless Avco has complied with the requirements of the building code in force at the time a permit is sought. Avco further contends that reasonable regulation by the Commissions is also permitted to the extent that it does not deprive Avco of its vested right to the previously approved uses of Tract 7479. What the Commissions fail to acknowledge, however, is that Avco still contends that it has a vested right to the previously approved *use* of Tract 7479.

More specifically, Avco contends that it has a vested right to develop Tract 7479 as a multifamily, multistructure residential development. Although densities have been approved, the location and size of specific buildings have not. Thus, just as Orange County has the right to add a requirement for, say, the installation of smoke detectors before a building permit will be issued, so do the Commissions retain the power to limit the height or location of buildings. However, Avco contends that neither Orange County nor the Commissions can impose new requirements which deprive Avco of its vested right to the previously approved uses of Tract 7479, up to the previously approved densities.

The Commissions argue that there was no evidence which indicates what uses Avco intended for Tract 7479. (Motion to Dismiss or Affirm at 8.) They do this by comparing Tract 7479 to Tract 6988, which Avco intended to develop only to the point of preparing lots for sale to the public, and arguing there is no way the two tracts can be told apart in terms of ultimate use. The Commissions are wrong.

The administrative record ("A.R.") contains objective evidence indicating that Orange County knew the uses which Avco intended for Tract 7479. The tentative tract map for 7479, approved by the Orange County Planning Commission on January 4, 1972, (A. R. Map 10) has the following as Note 2:

> "Proposed Land Use: multiple residential-lots 1, 3-10 inc., 12-19 inc., 21, 22
> Lots 11, 23, 27-Open space
> Lots 2, 20, 24-Recreation
> Lots 25, 26-Single family residental
> Lots A, B, C, D-Private streets"

Thus, there is objective evidence in the record of Avco's intention as to how Tract 7479 was to be developed despite the Commissions' statement to the contrary. The record does not contain equivalent information as to Tract 6988. Moreover, contrary to the Commissions' contention, Avco has not and does not concede that there is no exemption available for Tract 6988. That question was not before the courts of California nor is it before this Court; at no time has it been specifically addressed. However, the Commissions raised this point earlier before the California Supreme Court and, in Avco's letter to the California Supreme Court, dated January 15, 1976, at 8, Avco replied to the Commissions' discussion of the difference between the two tracts by pointing out that Avco bears the burden of showing the extent of its reliance when, and if, it should assert that it is entitled to an exemption for Tract 6988. A copy of page 8 of the January 15, 1976, letter is attached hereto as Exhibit "A" for this Court's information.

III.

The Federal Questions Presently Before This Court Are Substantial and Avco Has Never Held Otherwise.

The Commissions argue that Avco had considered the federal constitutional questions insubstantial and "virtually abandoned them when the matter came up before the California Supreme Court" bringing them to the Court's attention only by means of a letter after oral argument. (Motion to Dismiss or Affirm at 7.)

The Commissions neglect to note that Avco, having lost in the trial court, raised constitutional questions before the Court of Appeal. Having prevailed in the

Court of Appeal, and being required only to respond to the points made in the Commissions' Petition for Hearing to the California Supreme Court (which Petition did not refer to constitutional questions), Avco likewise did not address constitutional questions. Once the California Supreme Court granted a hearing, Avco presented the constitutional questions for that Court's consideration.

IV.

The Record, Which Contains All of the Facts in the Present Action, Does Not Indicate That the Orange County Harbor District Had Received Building Permits for the Beach Portion of Tract 7479.

The Commissions contend that the absence of evidence in the record as to the existence of building permits on the beach portion of Tract 7479 sold to the Orange County Harbor District should be interpreted against Avco. The Commissions also contend that a building permit was probably not needed. (Motion to Dismiss or Affirm at 12.) Both of these contentions are wrong.

Preliminarily it should be noted that the evidence before the courts of California "consisted entirely of the proceedings before the commission . . ." *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 790, 132 Cal.Rptr. 386, 389, 553 P.2d 546, 549 (1976). All of the information on which the Commissions made their decisions—whether to deny the claim of exemption for Tract 7479 or to grant it for the beach portion of Tract 7479—is in the administrative record. The resolutions, which set forth the information forming the basis on which the Commissions made their decisions, may be found in the administrative record at 182-313.

There is evidence in the record which leads to the inference that no building permits had been issued for construction on the beach portion of Tract 7479. The administrative record contains the Commissions' resolutions granting or denying claims of exemption for sixteen tracts. Each resolution sets forth the permits or approvals received. Six of the resolutions specifically reflect the fact that building permits had been obtained. (A.R. at 262, 270, 278, 286, 294, and 302.) There is no mention in the resolution granting the claim of exemption for the beach portion of Tract 7479 of any building permits having been issued. (A.R. at 212.) The absence of such a statement is evidence that no building permits had been obtained.

> "The consideration which we have found rendered the books [produced by the Department of the Treasury] admissible in evidence as tending to prove the truth of the statements of entries contained in them also make them admissible as evidence tending to show that because the receipt of the dividends were not entered in them, they were not received, and therefore were not paid. The evidence may not be as persuasive in the latter case as in the former, but that it was proper evidence to be submitted to the jury for the determination of its value we cannot doubt. Such books so kept presumptively contained a record of all payments made, and the absence of any entry of payment, where it naturally would have been found if it had been made, was evidence of non-payment, proper for the consideration of the jury." *Chesapeake and Delaware Canal Co. v. United States,* 250 U.S. 123, 129 (1919).

See also, 5 Wigmore, *Evidence* §1633(6) at 624 (Chadbourn rev. 1974):

> "Since the assumption of the fulfilment of duty is the foundation of the exception [for public records], it would seem to follow that if a duty exists to record certain matters when they occur, and if no record of such matters is found, then the *absence of any entry* about them is evidence that they did not occur; or, to put it in another way, the record, taken as a whole, is evidence that the matters recorded, and those only, occurred." [Emphasis in original.]

The inference is, then, that no building permits had been obtained for construction on the beach portion of Tract 7479.

Second, the Commissions' argument as to whether or not a county agency is required to obtain a building permit is sheer speculation and is supported by no evidence whatsoever. Certainly a review of the resolution adopted by the Board of Supervisors of Orange County on September 22, 1971,[1] which did no more than authorize the "acquisition, improvement, and maintenance" of the beach portion of Tract 7479 (A.R. at 408), cannot be taken as evidence of "action amounting to the equivalent of issuing a building permit". (Motion to Dismiss or Affirm at 12.) In summary, there is nothing in the record to support the Commissions' statement that

> "The Harbor District's parcel received county authorization not only for grading the parcel, but

[1]There is apparently a typographical error at A.R. 211 because the date is indicated there as September 21, 1971.

also to build the structures and facilities necessary to make it into a recreational park area, . . . Consequently, an exemption was granted to the County to complete all such structures and facilities." Motion to Dismiss or Affirm at 13.

The evidence, as cited in the Jurisdictional Statement at 21-22, has not been controverted in any way. The conclusion remains that the Commissions, by their actions, have denied Avco the equal protection which the 14th Amendment guarantees to every person.

V.
Conclusion.

For all of the foregoing reasons the Commissions' Motion to Dismiss or Affirm should be denied and probable jurisdiction should be noted.

Dated: February 8, 1977.

Respectfully submitted,

FULOP, ROLSTON, BURNS & MCKITTRICK,
A Law Corporation,
IRWIN M. FULOP,
LAWRENCE R. RESNICK,
Attorneys for Appellant.

EXHIBIT A.

The Honorable Donald R. Wright, Chief Justice, and the Honorable Associate Justices, January 15, 1976, Page 8.

Nowhere is this better illustrated than in Respondents' continued references to Tract 6988, another of Appellant's tracts. Unlike Tract 7479, Appellant intended to do nothing more with Tract 6988 than prepare lots for sale to purchasers who would then construct their own residences. Is there any question that the courts of California are competent to determine the scope of Appellant's reasonable reliance with respect to Tract 6988 if called upon to do so? If the law is that a vested right to construct homes on Tract 6988 would exist only if Appellant had at all times intended to build them itself, is there any question as to whether the courts of California are competent to determine whether Appellant intended to build or to sell to purchasers who would then build? The answer in each case must be no. If Appellant were to claim a vested right to build homes on Tract 6988, it would be Appellant's burden to show that it reasonably relied on Orange County's conduct as an approval of construction of buildings. Notwithstanding the scope of Orange County's approvals, if Appellant's reliance were limited to subdividing Tract 6988, its vested right would also be so limited. In the case at bar Appellant reasonably relied upon Orange County's conduct as an approval of the construction of buildings on Tract 7479 and the Trial Court's factual determination of the existence of the elements of an equitable estoppel reflects this.